as a release of the sureties, where there were two or more, because no question of contribution could possibly arise. If we regard the additional name as one of the makers of the note where there were two or more prior makers, and that they have a right to compel each other to contribute, it is clear, in case of the bankruptcy or insolvency of any one of the makers, that the liability of the remaining parties is increased by such additional name. But the addition of such additional maker, in such a case would not increase the liability of the two or more sureties; it would, in fact, be for their benefit, and, under the reasoning of those cases which hold that there is no release unless an actual injury is sustained, it would not work their release.

As to the other point raised in the principal case. In *Prather* v. *Zulauf*, 38 Ind. 155, it is said that the "delivery of a note is the final act of execution." See *Ketcham* v. *New Albany, etc., Railroad Co.*, 7 Ind. 391. In the case of *Bagley* v. *McMickle*, 9 Cal. 430, it was said that "the term 'has executed unto,' when applied to instruments of writing, impart both making and delivery." See *Faunce* v. *State Mutual Life Assurance Co.*, 101 Mass. 279; *Walbridge* v. *Arnold*, 21 Conn. 425; *State* v. *Young*, 23 Minn. 551.

So in Michigan, where a rule of court did not require proof of the execution of the instrument to be made unless denied under oath, it was said: "Execution can only refer to the actual making and delivery, but it cannot involve other matters without enlarging its meaning beyond reason:" *Freeman* v. *Ellison*, 37 Mich. 459.

Where an answer alleged that the defendant had "executed" the note sued on, but had never "delivered" it, it was held that the word "executed" was, as used, synonymous with the word "signed;" and that the answer, fairly construed, meant that the notes were signed but not delivered: *Ricketts* v. *Harvey*, 78 Ind. 152.

With reference to a deed, the word "execution" "means that it has been delivered, as well as signed and sealed:" *Gaskill* v. *King*, 12 Ired. 221.

W. W. THORNTON.

Crawfordsville, Ind.

Supreme Court of Iowa.

FIRST NAT. BANK OF NEVADA *v.* BRYAN ET AL.

A mortgage executed by a married woman under duress of imprisonment upon the person of her husband, is, as between her and the mortgagee, void.

The *bona fide* holder of a negotiable mortgage note, taken for value before maturity, may recover upon it, although both note and mortgage were obtained by duress; but he is not entitled to a foreclosure of the mortgage where the property is the wife's homestead mortgaged to secure the husband's note.

Mortgages are not intended to circulate as commercial paper, and the interests of commerce do not require that the principles applicable to negotiable paper be extended to mortgages executed as was the one in question.

Where the answer does not formally allege duress, but sets up facts sufficient to constitute it, the defence will be received, evidence of duress being admitted without objection.

APPEAL from the District Court of Story county.

The plaintiff, as the endorsee before maturity of a negotiable

promissory note for $645, executed by Solon Bryan to the order of P. F. Nelson, brings this action to recover the amount of said note, and to foreclose a mortgage to secure the same, executed by Mary E. Bryan and Solon Bryan upon their homestead. The court found that both the note and mortgage were obtained by duress, and that the plaintiff, as an innocent holder of the note for value before maturity, was entitled to recover upon the note, but was not entitled to a foreclosure of the mortgage.

Dyer & Fitzpatrick, for appellant.

C. H. Balliett and *S. F. Balliett*, for appellee.

DAY, C. J.—The appellant insists that the answer does not set up that the note and mortgage were obtained by duress. The appellee filed an amended abstract, setting forth that the defendant under leave of court filed an amended answer to meet the evidence, formally setting up that the note and mortgage were made under duress. The appellant denies that such amendment was filed. We have examined the transcript and do not find any reference to such amendment. However, we regard this question as immaterial. The original answer sets up facts sufficient to present the defence of duress, in view of the fact that the evidence was admitted without objection.

It appears from the evidence that Solon Bryan had a contract for erecting a school-house in Harlan; that he purchased the bricks therefor from P. F. Nelson, and that to secure $945 of the purchase price he executed a chattel mortgage upon 150,000 of the bricks; that he failed in the execution of his contract, and turned over his contract, together with the bricks mortgaged to Nelson, to his sureties on his bond for the performance of his contract, and that they assumed and completed the erection of the building. It further appears that the sureties had knowledge of the existence of the mortgage when they took the assignment of the contract. The attorney of Nelson locked Solon Bryan in his office, and demanded a mortgage to secure the balance due on the bricks, which was then $645, and represented that, unless he executed the mortgage, he was liable to prosecution, and would probably be prosecuted for selling and disposing of mortgaged property. The attorney also procured a letter to Mary E. Bryan from her husband for a description of the homestead property. She at first refused

to furnish a description without seeing her husband. The attorney of Nelson told her that she could not see her husband; that he was locked up in his office, and could not come out; that Bryan had sold mortgaged property, and that they had a warrant for his arrest; and that if she would give a description of the homestead for a mortgage, it would save his arrest; that it was a penitentiary offence to sell mortgaged property; and that if she did not give the description they would send him to the penitentiary. Mary E. Bryan went to the office of the attorney and was admitted, and her husband then told her that they had got him into some trouble, and that by giving a mortgage upon the homestead for a short time, it would help him out. It seems that the note and mortgage were executed at that time and place. Mary E. Bryan testifies that she was induced to sign the mortgage by what the attorney had said, that it would save Mr. Bryan's arrest, and that they would straighten it up before the mortgage was due. We are satisfied that the execution of the mortgage was not the voluntary act of Mary E. Bryan, and that it was obtained by duress, under the doctrine of *Green* v. *Scranage*, 19 Iowa 461.

The most important question in the case is as to whether the plaintiff, an innocent holder of the note before maturity, is entitled to a foreclosure of the mortgage. It has been held by this court that a *bona fide* endorsee before maturity of a note secured by a mortgage, without notice of infirmities, takes the mortgage as he takes the note, free from the defences to which it is subject in the hands of the mortgagee: *Preston* v. *Case*, 42 Iowa 549; *Farmers' Nat. Bank of Salem* v. *Fletcher*, 44 Id. 252; *Clasey* v. *Sigg*, 51 Id. 371. In all of these cases the mortgages were voluntarily executed upon the property of the persons who executed the notes. Beyond the doctrine of these cases we do not feel justified in going in the application to mortgages of the principles which pertain to negotiable paper. In *Burbank* v. *Warwick*, 52 Iowa 493, where no note was delivered with the mortgage to the mortgagee, it was held that an assignee of the mortgagee took it subject to all equities between the original parties. In *Tabor* v. *Foy*, 56 Iowa 539, where the note accompanying the mortgage was forged, it was held that the assignees of the mortgagee took it subject to all defences existing against it in the hands of the mortgagee, notwithstanding the admission of the mortgagor that she signed the mortgage. This case differs from all those which have heretofore been

determined in this court. In this case the mortgaged property belongs to Mary E. Bryan, who did not sign the note, and the mortgaged property is her homestead. Her execution of the mortgage was procured by duress, and was not her free and voluntary act. Section 1990 of the Code requires the concurrence of both the husband and wife to a conveyance or incumbrance of the homestead. Mary E. Bryan did not legally concur in this conveyance. As between her and the mortgagee the mortgage was void. Mortgages are not intended to circulate as commercial paper, and we do not think that the interests of commerce require that the principles applicable to negotiable paper shall be extended to a mortgage executed under such circumstances as the mortgage in question. The judgment of the court below is affirmed.

The general question involved in the principal case is so well considered by Mr. Jones, in his valuable work on mortgages (vol. 1, sect. 834), that we cannot do better than to use his language. He says: "An assignee for value of a negotiable note before due, takes it free from equities. At common law, so far as a mortgage is merely a debt, or security for a debt, it is a chose in action not negotiable, and, therefore, not assignable. * * * But the debt being the principal thing imparts its character to the mortgage; and although the mortgage itself in the beginning is only assignable in equity, the legal rights and remedies upon the debt have become fixed upon this incident of the debt, and the equitable principles in regard to the mortgage have become naturalized in the common-law system. When, therefore, the debt secured is in the form of a negotiable note, a legal transfer of this carries with it the mortgage security; and inasmuch as a negotiable promissory note, by the commercial law, when assigned for value before maturity, passes to the assignee free from all equitable defences to which it was subject in the hands of the payee, it does not lose this character which it has under the commercial law, when it is secured by a mortgage. The mortgage rather is regarded as following the note, and as taking the same character; and it is the generally received doctrine that the assignee of a mortgage securing a negotiable note, taking it in good faith before maturity, takes it free from any equities existing between the original parties:" *Beals* v. *Neddo*, (U. S. C. C. Kans. 1880), 2 Fed. Rep. 41; *Carpenter* v. *Lorgan*, 16 Wall. 271; *Kennicott* v. *Supervisors*, Id. 452; *Sawyer* v. *Prichett*, 19 Id. 166; *Hayden* v. *Drury*, (U. S. C. C. Ill. 1880), 3 Fed. Rep. 782; *Paige* v. *Chapman*, 58 N. H. 333; *Taylor* v. *Page*, 6 Allen 86; *Sprague* v. *Graham*, 29 Me. 160; *Pierce* v. *Faunce*, 47 Id. 507; *Gould* v. *Marsh*, 4 Thomp. & C. 128; s. c. 1 Hun 566; *Dutton* v. *Ives*, 5 Mich. 515; *Cicotte* v. *Gagnier*, 2 Id. 381; *Bloomer* v. *Henderson*, 8 Id. 395; *Reeves* v. *Scully*, Walk. Ch. 248; *Jones* v. *Smith*, 22 Mich. 360; *Helmer* v. *Krolik*, 36 Id. 371; *Croft* v. *Bunster*, 9 Wis. 510; *Cornell* v. *Hichins*, 11 Id. 353; *Fisher* v. *Otis*, 3 Chand. (Wis.) 83; *Martineau* v. *McCollum*, 4 Id. 153; *Kelley* v. *Whitney*, 45 Wis. 110; *Burhans* v. *Hutcheson*, 25 Kans. 625; *Webb* v. *Haselton*, 4 Neb. 308; *Preston* v. *Case*, 42 Iowa 549; *Updegraft* v. *Edwards*, 45 Id. 513; *Farmers' Nat. Bank* v. *Fletcher*, 44 Id. 252; *Duncan* v. *Louisville*, 13 Bush 378; *Bilgery* v.

Ferguson, 3 La. Ann. 84; *Logan* v. *Smith*, 62 Mo. 455; *Gubbert* v. *Schwartz*, 69 Ind. 450.

In *Carpenter* v. *Lorgan*, 16 Wall. 271, which was an appeal from the Supreme Court of Colorado, the question was ably considered, and a conclusion arrived at in harmony with the prevailing opinion, as above stated. In rendering the opinion of the court, Mr. Justice SWAYNE, after stating, among other things, the doctrine that this was a case in which equity must follow the law, said: "A different doctrine would involve strange anomalies. The assignee might file his bill and the court dismiss it. He could then sue at law, recover judgment, and sell the mortgaged premises under the execution. It is not pretended that equity would interpose against him. So, if the aid of equity were properly invoked to give effect to a lien of the judgment upon the same premises for the full amount, it could not be refused. Surely such an excrescence ought not to be permitted to disfigure any system of enlightened jurisprudence. It is the policy of the law to avoid circuity of action, and parties ought not to be driven from one forum to obtain a remedy which cannot be denied in another."

"The mortgaged premises are pledged as security for the debt. In proportion as a remedy is denied, the contract is violated and the rights of the assignee are set at nought. In other words, the mortgage ceases to be security for a part or the whole of the debt, its express provisions to the contrary notwithstanding. The note and mortgage are inseparable; the former as essential, the latter as incident. An assignment of the note carries the mortgage with it, while the assignment of the latter alone is a nullity:" *Jackson v. Blodgett*, 5 Cow. 205; *Jackson* v. *Willard*, 4 Johns. 43. * * * "The transfer of the note carries with it the security, without any formal assignment, delivery, or even mention of the latter. If not assignable at law, it is clearly so in equity. When the amount due on the note is ascertained in the foreclosure proceeding, equity recognises it as conclusive, and decrees accordingly. Whether the title of the assignee is legal or equitable is immaterial. The result follows irrespective of that question. The process is only a mode of enforcing a lien. All the authorities agree that the debt is the principal thing, and the mortgage an accessory. Equity puts the principal and accessory upon a footing of equality, and gives to the assignee of the evidence of the debt the same rights in regard to both. There is no departure from any principal of law or equity in reaching this conclusion. There is no analogy between this case and one where a chose in action, standing alone, is sought to be enforced. The fallacy which lies in overlooking this distinction, has misled many able minds, and is the source of all the confusion that exists. The mortgage can have no separate existence. When the note is paid the mortgage expires. It cannot survive for a moment the debt which the note represents. This dependent and incidental relation is the controlling consideration, and takes the case out of the rule applied to choses in action, where no such relation of dependence exists. *Accessorium non ducit, sequitur principale.*"

The subject has been regulated by statute in New Jersey, by which it is enacted, that in a suit by an assignee of a mortgage, all just set-offs and other defences shall be allowed against him which would have been allowed if the action had been brought by his assignor: Rev. 1877, p. 708, sect. 31.

In New York and Pennsylvania, by almost universal practice, bonds are used in connection with mortgages instead of promissory notes; and in those states the rule supported by the weight of authority, as above stated, does not prevail. See Jones on Mort.

(3d ed.), sect. 834, note and cases cited.

In a few states it has been held, contrary to the general doctrine, that, although the mortgage note is negotiable, the mortgage itself is only assignable in equity, and, therefore, the assignee having to resort to equity to enforce his rights, is compelled to do equity towards the mortgagor, and allow him all the rights of defence he had against the mortgagee; that the mortgage follows the notes only in equity, and is subject, in the hands of the assignee, to any defence which would avail against it in the hands of the mortgagor himself, notwithstanding the assignee may have purchased the note in good faith, for a valuable consideration and before maturity: 1 Jones on Mort. (3d ed.), sect. 838; *Johnson* v. *Carpenter*, 7 Minn. 176; *Hostetter* v. *Alexander*, 22 Id. 559; *Boligny* v. *Forties*, 17 La. Ann. 121; *Olds* v. *Cummings*, 31 Ill. 188; *Fortier* v. *Darst*, Id. 212; *Walker* v. *Dement*, 42 Id. 273; *Bryant* v. *Vix*, 83 Id. 11; *Darst* v. *Gale*, 83 Id. 136; *Ellis* v. *Sisson*, 96 Id. 105; *U. S. Mortgage Co.* v. *Gross*, 93 Id. 483; *Chicago, &c., Railway Co.* v. *Loewenthal*, Id. 433; *Baily* v. *Smith*, 14 Ohio St. 396; *Corbett* v. *Woodward*, (U. S. C. C. Oregon), 5 Sawyer 403.

The question involved in the principal case appears to be new and not easy of solution. If, under sect. 1990 of the Code of Iowa, providing that "a conveyance or encumbrance by the owner is of no validity, unless the husband and wife, if the owner is married, concur in and sign the same joint instrument," the mortgage in question is regarded as absolutely void, the question is relieved from difficulty; for, if void, the defence may be made as against any person. In this connection the cases of *Edgell* v. *Hagens*, 53 Iowa 223; *Van Sickles* v. *Town*, 53 Id. 259, and *Spafford* v. *Warren*, 47 Id. 47, may be read with profit. If, however, the mortgage is regarded as merely voidable by reason of duress, the question is more difficult; and the authorities, so far as they have come to our notice, do not appear to be conclusive upon the question. The general rule is, that duress does not render a contract absolutely void, but only voidable. In *Worcester* v. *Eaton*, 13 Mass. 376, it was held that a deed for the conveyance of land, acknowledged and recorded, but obtained by duress, might be avoided by the entry of the grantor or his heirs within the period of entry, notwithstanding the land had been sold by the original grantee to a *bona fide* purchaser. In such a case the maxim *caveat emptor* was said to apply, as in the case of a grant from an infant. In *Belote* v. *Henderson*, 5 Cald. 471, the same principle was applied to a contract of sale of a chattel obtained by duress. See, however, *contra*, *Deputy* v. *Stapleford*, 19 Cal. 302; *Cook* v. *Moore*, 39 Texas 255, where it was held that a deed, though obtained by fraud and duress, is only voidable, and that a *bona fide* purchaser from the grantee in such deed, for a valuable consideration, without notice of the fraud or duress, can hold the property. In *Bissett* v. *Bissett*, 1 H. & McH. 211, it was held, that an acknowledgment of a deed by a *feme covert*, extorted from her by duress, beating and ill usage, but where she was privately examined by the magistrate, could not be avoided on account of such duress, on the ground that she might have been relieved at the time of such acknowledgment, had she so chosen. The contrary, however, was held in *Worcester* v. *Eaton*, *supra*, and as it would seem properly. See, also, to the same point, *Central Bank* v. *Copeland*, 18 Md. 319. As to what evidence is necessary to overcome the certificate of acknowledgment, see *Russell* v. *Baptist Theological Sem.*, 73 Ill. 337; *N. W. Ins. Co.* v. *Nelson*, 13 Otto 544.

Neither the above cases nor those cited by the court in the principal case, are,

however, conclusive upon the question involved in the principal case, whether the wife may insist upon the duress as a defence to the mortgage in the hands of a *bona fide* assignee of the note and mortgage, and no case has been found that discusses this question. Without considering this question further, the principal case may probably be supported on the ground that the mortgage was void, as stated by the court, though it is to be regretted that the court did not discuss the question above stated upon principle, and thereby settle a question at once important and interesting; for it can hardly be considered that a decision upon a new and important question not stating the reasons upon which it is to be sustained, will be accepted as conclusive upon subsequent cases involving similar questions.

M. D. EWELL.

Chicago.

ABSTRACTS OF RECENT DECISIONS.

SUPREME COURT OF THE UNITED STATES.[1]

SUPREME COURT OF ILLINOIS.[2]

SUPREME JUDICIAL COURT OF MASSACHUSETTS.[3]

SUPREME COURT OF NEW JERSEY.[4]

SUPREME COURT OF OHIO.[5]

AGENT.

Breach of Trust—Obtaining Renewal of Lease for his own Benefit.—Where a confidential agent of one having a lease of a theatre, who, from his position, was well acquainted with the profits of his principal in the use of the building, and who knew, some months before the old lease expired, that the latter was desirous of renewing his lease, offered privately to lease the theatre of the owner, proposing to give a larger rental than was reserved in the old lease, and denied to his principal that he was competing with him for the lease, but in fact did procure a lease to be made to himself, it was *held*, that the benefit of such lease a court of equity would hold to inure to his principal, and that the agent would hold the same as a trustee for his principal: *Davis* v. *Hamlin*, 108 Ill.

Courts of equity recognise a reasonable expectation of a tenant of a renewal of his lease as an interest of value, and hold that the act of an agent in the management of the lessee's business, in interfering with and disappointing such expectation by procuring the lease to himself, is inconsistent with the fidelity which the agent owes to the business of

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[1] Prepared expressly for the American Law Register, from the original opinions. The cases will probably appear in 109 U. S.

[2] From Hon. N. L. Freeman, Reporter; to appear in 108 Ill. Reports.

[3] From John Lathrop, Esq., Reporter; to appear in 135 Mass. Reports.

[4] From G. D. W. Vroom, Esq., Reporter; to appear in 16 Vroom Reports.

[5] From E. L. DeWitt, Esq., Reporter. The cases will probably appear in 39 or 40 Ohio St. Reports.